

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-5017

To be argued by
CHARLES H. WEINTRAUB

In The
United States Court of Appeals
For The Second Circuit

In re

PRECISION POLYMERS, INC., PRECISION
THERMOPLASTICS CORP., FLO-TITE PLASTICS CORP.,
Debtors.

ROBINTECH INCORPORATED, SHINTECH
INCORPORATED, PLASTILINE, INC.,
Appellants,

-against-

PRECISION POLYMERS, INC., PRECISION
THERMOPLASTICS CORP.,
Appellees.

On Appeal from the United States District Court for the
Southern District of New York.

BRIEF FOR APPELLEES

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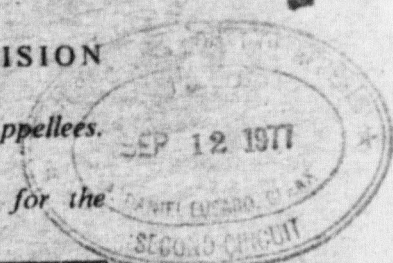


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PRELIMINARY STATEMENT

This appeal is from an opinion and order (J.A.366) issued by the Honorable Whitman Knapp of the United States District Court for the Southern District of New York dated June 6, 1977, which affirmed an order of the Honorable John J. Galgay, Bankruptcy Judge, dated April 5, 1977 (J.A. 360) pursuant to which the Bankruptcy Court approved a compromise entered into between the appellants and appellees as "...reasonable and in the best interest of the debtors and their creditors...."

ISSUES PRESENTED ON REVIEW

Appellants claim that the District Court erred in affirming the order of the Bankruptcy Court dated April 5, 1977 for the following reasons:

1. The Bankruptcy Court was either stayed or ousted from jurisdiction from approving the compromise either by reason of the pendency of an appeal to the Circuit Court or by the filing of a supersedeas bond therein.
2. The notice of the hearing to approve the compromise was improper.
3. The findings of fact and conclusions of law of the Bankruptcy Judge, which were affirmed by Judge Knapp, were clearly erroneous and the Bankruptcy Judge abused his discretion by making said findings.

STATEMENT OF FACTS

The three debtors filed petitions for arrangement in the United States District Court for the Southern District of New York on October 20, 1976 and the three proceedings were consolidated for procedural purposes only. At that time there was a civil action pending in the district court before District Judge Whitman Knapp in which the two appellees were suing the appellants. Appellants thereafter moved in the bankruptcy court for dismissal of the arrangement proceedings or a change of venue. During the trial of this motion, a compromise of the civil action which included a withdrawal with prejudice of the dismissal/transfer motion was discussed and negotiated, culminating in a "statement for the record" by Bankruptcy Judge Galgay on December 14, 1976 setting forth the terms of the compromise. The compromise, as mandated by the applicable provisions of the Bankruptcy Act and Rules of Bankruptcy Procedure, was subject to approval by the Bankruptcy Court.

The next day, appellants attempted to repudiate the settlement. Appellees took the position that this could not be done and moved before the Bankruptcy Court for its approval. A hearing was held before Judge Galgay on January 5, 1977 and appellees' motion for approval of the compromise was denied because the existence of the compromise had not been judicially determined. Appellees appealed to the District Court from Judge Galgay's January 5, 1977 ruling and simultaneously moved in the civil action for a determination

of the "compromise" issue. Both the motion addressed to the "compromise" issue and this appeal were heard simultaneously by District Judge Knapp. His decision of March 18, 1977 ruled that the December 14, 1976 "statement for the record" was a valid, enforceable settlement agreement and dismissed appellee's appeal from the January 5 order as moot, remanding the bankruptcy proceeding to Judge Galgay (J.A. 154).

On March 25, 1977, appellants appealed to this court from Judge Knapp's opinion of March 18 and thereafter filed a supersedeas bond, even though there was no final money judgment. It should be noted that the appeal and the bond were dismissed and released by orders dated May 3, 1977.

By application dated March 22, 1977 and order to show cause dated March 23, 1977 (J.A. 156-A), appellees moved pursuant to the remand for an order pursuant to Section 27 of the Bankruptcy Act, 11 USC §50 and Rules 11-2(3), 11-63 and 919(a) of the Rules of Bankruptcy Procedure for the Bankruptcy Court's approval of the settlement. Notice of the hearing was given to appellants and the official creditors' committee pursuant to court order.

Following a hearing held before Judge Galgay on March 28, 1977 and continued on March 31, 1977 the court

made its findings of fact, conclusions of law and entered an order on April 5, 1977 (J.A. 360) approving the compromise.

Judge Galgay made the following findings of fact and conclusions of law:

FINDINGS OF FACT

"1. On March 28, 1977 and March 31, 1977 a hearing was held before the undersigned on notice to the members of the Official Creditors' Committee to determine whether the Court should approve a compromise between the debtors in possession and Robintech et al.

"2. The debtors in possession and the Official Creditors' Committee recommend approval of the offer of compromise.

"3. The compromise will result in an increase of the assets of the estate and will be beneficial to the creditors.

CONCLUSIONS OF LAW

"5. There is an enforceable contract of settlement entered into between Robintech et al. and the above named debtors in possession.

"6. The proposed settlement is reasonable and in the best interest of the debtors and their creditors."

The appellants appealed to the District Court and on June 6, 1977, Judge Knapp issued an opinion and order (J.A. 366) affirming the order of the Bankruptcy Court approving the compromise. It is from this opinion and order that the present appeal has been taken.

Shortly thereafter, a final judgment was entered in the civil action. Appellants appealed from that judgment,

filing a new supersedeas bond, and that appeal (77-7339) is being heard in conjunction with the instant appeal.

Subsequently, the appellees filed a plan of arrangement with the bankruptcy court. Part of the consideration going to general creditors is an assignment of the net settlement proceeds for pro rata distribution among them.

POINT I

THE BANKRUPTCY COURT HAD JURISDICTION TO
CONSIDER THE DEBTORS' MOTION FOR APPROVAL
OF A COMPROMISE AND WAS NOT STAYED BY THE
FILING OF THE SUPERSEDEAS BOND

A. Appellants raise the question of whether the bankruptcy court had jurisdiction to consider the appellees' application for approval of a compromise between appellants and appellees. The issue is best discussed in the context of the facts which have heretofore been set forth.

Appellees first applied to the bankruptcy court for approval of the compromise on December 28, 1976. At the hearing on January 5, 1977, this application was denied, there being an issue as to whether there was in fact a compromise to be approved. Appellees appealed to the district court and this appeal was referred to Judge Knapp who was simultaneously hearing the issue of the existence of the compromise in the context of a pending civil action. The appeal by appellees from the January 5 order was dismissed by Judge Knapp as moot, and the matter was remanded to the bankruptcy judge due to Judge Knapp's contemporaneous finding that there was in fact a valid, enforceable agreement of compromise. Both rulings were contained in a single memorandum and order (J.A. 154-155) dated March 18, 1977. On March 25, 1977, appellants filed a single notice of appeal (J.A. 157) covering both the civil action and the bankruptcy appeal.

Appellants contend that their filing of the notice

of appeal to the Circuit Court in the bankruptcy proceeding (i.e., an appeal from a dismissal of appellee's appeal) divested the bankruptcy court of jurisdiction on the remand. (Appellants' Brief, at 2). Judge Knapp disposed of this argument as follows:

"With respect to the jurisdictional question, we find ample authority for the proposition that an appeal taken from a non-appealable order does not divest the lower court of jurisdiction. 'Otherwise, a litigant could temporarily deprive a court of jurisdiction at any and every critical juncture.' Hodgson v. Mahoney (2d Cir. 1972) 460 F.2d 326, 328 9 Moore's Federal Practice (2d ed) ¶203.11 at 736-39. Here, our decision appealed from was manifestly non-final. Moreover, even if our decision were appealable (so that the district court was stayed), the appellants filed their notice of appeal only in the civil case before us, 76 Civ. 1746, not from our simultaneous remand of the bankruptcy case to Judge Galgay. Accordingly, there is no basis upon which the bankruptcy court could have been stayed. '[T]he well-recognized rule that a court is without jurisdiction to modify a decision during the pendency of an appeal is inapplicable here where two independent proceedings were involved.' Compania Espanola de Pet. S.A. v. Nereus Shipping (2d Cir. 1975) 527 F.2d 966, 972. 9 Moore's Federal Practice, supra. Further, it is clear that the filing of a supersedeas bond, designed pursuant to Rule 62 of the Federal Rules of Civil Procedure to stay execution of a judgment, was irrelevant to the bankruptcy court's jurisdiction. Finally, the appeal was withdrawn before the Court of Appeals took any action, and it would be a wasteful duplication of judicial effort to require Judge Galgay to conduct proceedings concerning the settlement all over again." (J.A. 366-367)

To the extent that Judge Knapp's conclusions need further support, the court's attention is drawn to

the "Form C - Civil Appeal Pre-Argument Statement" filed by appellants in regard to the original appeal. [A copy of this statement is appended hereto as Appendix A.] Form C indicates that the appeal was solely from the order respecting the civil action by reference to docket number, to the description of the nature of the case and result below and by the statement of issues proposed to be raised on appeal. No "Form C" was filed in regard to the "alleged" appeal from the order as it affected the motion for approval of the compromise.

The appeal by the debtors (appellees herein) from the January 5 order was dismissed as moot. This was a victory for the appellants herein (appellees on that appeal). Now the current appellants contend that they appealed from the favorable aspects of the March 18 memorandum and order, presumably to divest the bankruptcy court of jurisdiction. Even if this were the fact, such conduct should not be countenanced by this court.

B. Appellants' arguments regarding the effect of the supersedeas bond are equally ineffectual. Judge Knapp's conclusions in this regard have already been set forth. In furtherance of his rationale it must be pointed out that Rule 62(d) of the Federal Rules of Civil Procedure is not strictly applicable to the bankruptcy proceedings and assuming Rule 62(d)'s applicability to bankruptcy proceedings, the scope of the stay would not encompass the application for approval of the compromise. The fact that the appeal in regard

to which the bond was filed did not apply to the Bankruptcy Court order also negates appellants' contention.

While Rules 11-63, 914 and 762 of the Bankruptcy Rules make Federal Rule 62 generally applicable to the proceeding to approve the compromise, there are limitations contained in Rule 805. That Rule provides, inter alia, that:

"...Notwithstanding Rule 762 but subject to the power of the district court reserved hereinafter, the referee may suspend or order the continuation of proceedings or make any other appropriate order during the pendency of an appeal upon such terms as will protect the rights of all parties in interest...."

Thus assuming that the supersedeas bond related to an appeal from an order or judgment of the bankruptcy court (which it does not) the referee (i.e. bankruptcy judge) retains the discretion to proceed. No abuse of discretion is charged in this regard.

Next, the scope of Federal Rule 62 is the "Stay of Proceeding to Enforce a Judgment." The application for approval of the compromise was a proceeding en route to obtaining a judgment and not an enforcement proceeding. Furthermore, Federal Rule 62(d) applies to money judgments, something the debtors did not have.

"Under Rule 62(d), a party taking an appeal from a money judgment rendered against him in a district court can stay proceedings to enforce that judgment pending appeal only by furnishing a supersedeas bond." 7 Moore's Federal Practice, ¶62.06, p. 62.28 (2d ed.).

Rule 62(d) does not apply where no execution on the judgment is involved. See Shay v. Agricultural Stabilization and

Conservation State Committee for Arizona, 299 F.2d 516
(9th Cir. 1962).

Finally, it is noted that the supersedeas bond was withdrawn by order dated May 3, 1977. (J.A. 364) The Bankruptcy Court clearly had the power to enter its April 5, 1977 order approving the compromise.

POINT II

NOTICE TO THE CREDITORS' COMMITTEE OF
THE HEARING TO APPROVE THE COMPROMISE
WAS ADEQUATE UNDER THE CIRCUMSTANCES.

Rule 203(f) of the Rules of Bankruptcy Procedure specifically indicates that where a Creditors' Committee is functioning notice to all of the creditors is not required. Pursuant to this provision Judge Galgay issued the order to show cause calling the hearing on March 23, 1977 (J.A. 156-A). The Court's order regarding notice reads as follows:

"ORDERED, that service of a copy of this order and the application upon which it is granted personally upon Krause, Hirsch & Gross, attorneys for Robintech, Incorporated, Shintech, Incorporated and Plastiline, Inc. at 41 East 42nd Street, New York, New York, and by mail upon Jay Benenson, Esq. at 744 Broad Street, Newark, New Jersey, attorney for the Official Creditors' Committee herein and upon all members of the Official Creditors' Committee at their respective addresses on or before 5:00 p.m., March 23, 1977 shall be deemed good and sufficient service; and it is further..."

This decretal paragraph is in conformity with the applicable Bankruptcy Act and Bankruptcy Rule provisions.

Under §58a of the Bankruptcy Act, 11 U.S.C. §94a, notice of "the proposed compromise of a controversy...where a creditors' committee has been appointed pursuant to this Act...shall be sent only to such committee and to the creditors who have filed with the court a demand that all notices under this subdivision be mailed to them...."

Under Rule 203 of the Rules of Bankruptcy Procedure "...if a creditor's committee has been elected, the court may order that notices...[of]...the hearing on the approval of a compromise or settlement of a controversy...be mailed only to the committee or its authorized agent and to creditors who file with the court a request that all notices under these clauses be mailed to them...."

As previously indicated an official creditors' committee has been elected and that committee did receive notice of the hearing. The court found that the official creditors' committee recommends approval of the offer of compromise. Finding of Fact No. 2. (J.A. 361) The complaining "creditors" also received notice of the hearing and in fact appeared at the hearing and actively participated in it. This fact seriously impacts upon appellants' standing to even raise the "notice" issue. Furthermore, assuming arguendo that the notice provision made by Judge Galgay was improper under the circumstances of this particular compromise, (appellants cannot argue that the Judge did not have the power to decree such notice),

appellants have not appealed from the order of March 23, 1977 which dealt with the notice question and is now a final non-appealable order.

Appellants at page 16 of their memorandum boldly state that "despite the provisions of Rule 203(f) of the Rules of Bankruptcy Procedure, notice to all creditors should have been mandated in this case." However, no authority is cited for this proposition which is clearly in conflict with the rule and the statute. As Judge Knapp indicated in his decision no basis could be found for the conclusion that Judge Galgay abused his discretion in approving the settlement (J.A. 367). Further, Judge Knapp indicated that under the particular circumstances of the instant case it was perfectly reasonable for notice to be given as Judge Galgay had directed (J.A. 368).

Finally, appellees draw the court's attention to the answer (J.A. 159) interposed by appellants in response to the debtors' application which does not raise the notice issue as an affirmative defense. This should constitute a waiver of this position by appellants.

POINT III

THERE WAS NO ABUSE OF DISCRETION BY THE
BANKRUPTCY JUDGE IN APPROVING THE COM-
PROMISE, NOR WERE THE BANKRUPTCY JUDGE'S
FINDINGS OF FACT OR CONCLUSIONS OF LAW
CLEARLY ERRONEOUS

Section 27 of the Bankruptcy Act, 11 U.S.C. §50,
provides:

"Compromises. The receiver or trustee may,
with the approval of the court, compromise
any controversy arising in the administration
of the estate upon such terms as he may deem
for the best interest of the estate."

Rule 919(a) of the Rules of Bankruptcy Procedure is an
adaptation of §27 and reads as follows:

"On application by the trustee or receiver
and after hearing on notice to the creditors
as provided in Rule 203(a) and to such other
persons as the court may designate, the court
may approve a compromise or settlement."

Rule 11-2(3) states that:

" 'Receiver,' 'trustee,' receiver in
bankruptcy' means the 'receiver,' 'trustee,'
or 'debtor in possession' in the Chapter XI
case."

Rule 11-63 makes Rule 919(a) applicable to Chapter XI proceedings.

"The proceeding to compromise may be
initiated by a written application which
may be made by...the debtor in possession.
Once the application has been filed, a day
and place for a hearing on the proposed com-
promise shall be set by the court and such
notice may be given to creditors and interested
parties as the court may direct..." Collier on
Bankruptcy §27.03, pp 1087-1089 (14th ed. 1976).

There are guidelines for the court to consider:

"....Although creditors' wishes are
important and ordinarily should prevail,

the court has the last word, and should consider all the factors of the situation. In Drexel v. Loomis, the court said:

'In determining the advisability of accepting an offer of compromise many considerations are addressed to the sound discretion of the referee... (a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.'

"The court will usually approve a compromise which results in an increase of the assets of the estate and will prove beneficial to the creditors; but it will not sanction such compromise if coupled with an agreement not to furnish evidence in a criminal proceeding against the bankrupt or in any way to stifle such prosecution. The court will not, of course, under any circumstances sanction a compromise which it feels is not in the best interests of the estate; and the compromise must necessarily be based on a valuable consideration." Collier on Bankruptcy §27.04 1091-1093 (14th ed. 1976).

"The decision of the referee in bankruptcy [bankruptcy judge] as to the approval or disapproval of a compromise agreement rests upon his sound discretion. Such a decision is reviewable by the district judge, but will normally not be set aside except where there is a plain error or abuse of discretion. Nor will the order of the district judge be reversed by the court of appeals unless discretion has been abused." Collier on Bankruptcy, §27.03, pp 1094-1095 (14th ed. 1976).

In this context, with the "Findings of Fact" (see supra at 4) not being contested (see Bankruptcy Rule 810),

it stands undisputed that "the compromise will result in an increase of the assets of the estate and will be beneficial to the creditors....[and that]... The proposed settlement is reasonable and in the best interest of the debtors and their creditors." On those facts, the court properly approved the compromise. Appellants have failed to demonstrate an abuse of discretion.

Appellants have not shown to either the District Court nor this Court that the Bankruptcy Judge's findings were "clearly erroneous."

It is axiomatic in the appellate review of decisions from the Bankruptcy Court that "[t]he court shall accept the referee's findings of fact unless they are clearly erroneous..." Rule 810 of the Rules of Bankruptcy Procedure; Earhart vs. Callan, 221 F.2d 160 (9th Cir., 1955), cert. den. 350 U.S. 829 (1955); Margolis vs. Nazareth Fairgrounds & Farmers Market, Inc., 249 F.2d 221 (2nd Cir. 1957). Moreover, this is a rule of law which is given strict enforcement in the Second Circuit. In re Cichanowicz, 247 F. Supp. 975 (E.D.N.Y. 1965), aff'd. 353 F.2d 538 (2nd Cir., 1965). Findings of the Bankruptcy Court should not be disturbed unless there is most cogent evidence of mistake and miscarriage of justice. Kowalsky vs. American Employers Insurance Co., 90 F.2d 476 (6th Cir. 1937).

The Appellants have failed to meet their burden of showing that the Bankruptcy Judge abused his discretion.

Further where, as here, there is evidence to support the Court's decision and findings, the Bankruptcy Judge's order is conclusive pursuant to Rule 810 of the Rules of Bankruptcy Procedure. See In re Dolnick, 374 F. Supp. 84 (N.D. Ill. 1974).

POINT IV

APPELLANTS' APPEAL IS FRIVOLOUS AND
WITHOUT MERIT, THE SOLE PURPOSE OF
WHICH IS TO DELAY THE ENFORCEMENT OF
THE JUDGMENT ENFORCING THE COMPROMISE

It is obvious that appellants are using this appeal solely as a means to delay the enforcement of the judgment obtained in the civil action. Such delay, which is now more than nine months from the date of the agreement, is prejudicial and detrimental to the rights of Appellees and their creditors. A review of the background of this case and the companion appeal bearing docket number 77-7339 reveals that Appellants have objected to every procedural and substantive move of Appellees and taken an appeal from every adverse decision of Judges Galgay and Knapp. The true motivation of Appellants is to delay and frustrate every step that could assist Appellees in reaching a successful conclusion to the Chapter XI arrangement proceedings. Appellants skillfully substituted a \$250,000 lawsuit for a \$23,000,000 one. Taking advantage of Appellees' economic plight, Appellants have repudiated a minimal settlement and, through appeals, continue to frustrate not only the original settlement but the decisions of the bankruptcy court and the district court below.

It is Appellees' belief that there is absolutely no merit to the instant appeal. This is highlighted by (1) the argument that an appeal from Judge Knapp's dismissal of Appellees' appeal from Judge Galgay's order of January 5, 1977, i.e. Appellants' singular appellate victory, stayed the bankruptcy court

from hearing the remand (Appellants' Brief, at 8-13);

(2) the argument that a supersedeas bond filed in a civil action (n.b. the bond related to an appeal from an order granting partial summary judgment, an order that Judge Knapp ruled was "manifestly non-final" [A367]) operated to stay the bankruptcy court from approving a compromise in the arrangement proceedings (Appellants' Brief, at 13-15);

(3) the argument that the notice of the hearing to approve the compromise was defective even though it complied with the provision of the applicable statute and rules. (Appellants' Brief, at 15-19); and (4) the argument that Judge Galgay abused his discretion in approving the compromise even though such approval was obviously mandatory based upon the findings of fact made by Judge Galgay, which findings have not been, and could not be, seriously contested. (Appellants' Brief, at 16-19). The whole point of the initial appeal to the district court from Judge Galgay's order of April 5, 1977, was to prevent or delay Appellees' in obtaining a judgment enforcing the compromise. This transparent attempt failed, yet Appellants have insisted on burdening this court and Appellees with this frivolous appeal.

This court should accordingly dismiss the appeal on its merits as frivolous. Further, because of the obvious

Bying tactics by Appellants, this Court should award Appellees damages, double costs, and attorneys' fees pursuant to 28 U.S.C. §1912, and F.R.A.P. Rule 38, 28 U.S.C.A.¹².

12. Federal Rules of Appellate Procedure, 28 U.S.C.A. provides:
Rule 38 -"If a Court of Appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."
See, Denscome v. Sayle, 340 F. 2d 311 (5th Cir. 1965) cert. den. 382 U.S. 814, (1965).

CONCLUSION

For the foregoing reasons Appellants' appeal should be dismissed as frivolous, Judge Knapp's order of June 6, 1977 affirming the order of Bankruptcy Judge Galgay dated April 5, 1977 should be affirmed, and Appellees herein should be granted a judgment against Appellants for damages, double costs and attorneys' fees.

Respectfully submitted,

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COURT OF APPEALS
SECOND CIRCUIT

In Re
PRECISION POLYMERS, INC., PRECISION
THERMOPLASTICS CORP., FLO TITE PLASTICS CO
CORP.,

Debtors. - against -

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

SS.:

I, James A. Steele being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 112 West 136th Street; New York, New York

That on the 12th day of Sept, 19 77 at 41 East 42nd St
New York, N.Y.

deponent served the annexed

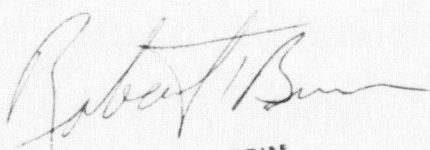
upon

Appellee Brief

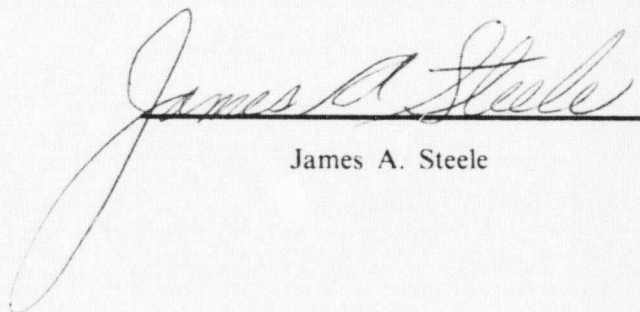
Krause Hirsch & Gross, Esqs.

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 12th
day of Sept, 19 77



ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979



James A. Steele